Supreme Court, U.S.
FILED

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No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1996

MANABU J. FURUKAWA,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Ninth Circuit is correct in its determination that airport police may seize the outbound luggage of a traveller, causing such luggage to miss its scheduled flight, without any probable cause or reasonable suspicion that such luggage contains contraband.

PARTIES TO THE PROCEEDINGS IN THE COURT OF APPEALS

United States of America, plaintiff-appellee

Manabu J. Furukawa, defendant-appellant

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Manabu Furukawa, respectfully prays that a Writ of Certiorari issue to review the not-for-publication memorandum opinion of the United States Court of Appeals for the Ninth Circuit entered October 17, 1996, affirming the conviction and sentence imposed on petitioner in the United States District Court for the Central District of California. The memorandum opinion became final upon the denial of Petitioner's petition for rehearing on December 5, 1996.

OPINIONS BELOW

The opinion of which review is sought is a not-for-publication memorandum opinion entitled *United States v.*

Manabu John Furukawa, No. 93-50605 in the United States Court of Appeals for the Ninth Circuit.

JURISDICTION

Petitioner invokes the jurisdiction of this Court under 28 U.S.C. 1254(1).

The United States Court of Appeals entered its decision on December 5, 1996, upon denial of a petition for rehearing.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fourth Amendment to the United States Constitution states that the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated, and or Warrants shall be issued, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

Petitioner was indicted on December 15, 1992 on one count of possession with intent to distribute cocaine. Petitioner filed a Motion to Suppress Evidence and Statements on February 11, 1993. The district court took the motion under submission on that date, thereafter denied Petitioner's motion on March 24, 1993, and filed findings of fact and law on June 21, 1993.

The case proceeded to jury trial. The jury returned a guilty verdict. The district court thereafter sentenced Petitioner to 151 months in the custody of the Bureau of Prisons on August 9, 1993. Petitioner appealed his conviction and sentence to the Ninth Circuit Court of Appeals. On Octo-

ber 17, 1996, a three-judge panel of that Court issued a not-for-publication memorandum opinion affirming the conviction and sentence. Petitioner thereafter petitioned the Court for rehearing and suggested rehearing *en banc*. The Court of Appeals denied the petition by order filed December 5, 1996.

SUMMARY OF ARGUMENT

The opinion below concludes that a traveller's rights are not violated by the arbitrary seizure of his or her luggage by airport police acting without reasonable suspicion or probable cause. By so concluding, the court below misapplied the decisions of this Court and is in conflict with the decisions of this Court and establishes an arbitrary and unjustified rule for review.

A Writ of Certiorari is appropriate to resolve the conflict which exists between the opinion below and opinions of this Court.

REASONS FOR GRANTING THE WRIT

THE COURT OF APPEALS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW IN A WAY THAT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT.

This case involves the seizure of innocent appearing travellers' luggage by law enforcement officers at Los Angeles International Airport, prior to any communication with the travellers. The officers in this case testified under oath that the seizure of the travellers' luggage was based only upon the fact that the travellers arrived at the airport approximately ten minutes prior to the scheduled time of departure, and the fact that one traveller carried the airline tickets for both himself and his companion. The Court of Appeals, by two to one vote, upheld the legality of this

seizure. Petitioner respectfully submits that the impact of this ruling on the right to travel guaranteed by the United States Constitution and on the right to be free from unreasonable searches and seizures, presents a question of exceptional importance that this Court should consider.

The law enforcement officers in this case denied under oath that they had received any advance information that individuals matching the descriptions of Jon Woo and his companion, Petitioner Manabu Furukawa, would be arriving at the airport carrying narcotics. Nevertheless, based only upon the fact that Petitioner and Woo arrived at the airport ten minutes prior to departure, and the fact that Mr. Woo carried the airline tickets for both himself and Petitioner, the officers seized all the individuals' luggage from the skycap and ordered the skycap not to allow the luggage to proceed to the aircraft. The officers' seizure of the suitcases was clearly conducted without probable cause or reasonable suspicion of criminality. The luggage was not placed on the scheduled flight due to the seizure. This arbitrary government seizure of personal property, conducted at most on an official's "hunch," blatantly violated the Fourth Amendment and the Constitutional right to travel. The case presents a question of substantial importance due to the lack of restriction on the actions of airport police, and the resulting intrusions on the Constitutional rights of innocent travellers in our nation's airports.

This Court has established that a traveller has a liberty interest in proceeding with his or her itinerary. *United States v. Place*, 462 U.S. 696, 708, 103 S.Ct. 2637, 2645 (1983). A seizure of a traveller's luggage can effectively restrain the traveller, as the person is subjected to the possible disruption of his or her travel plans in order to remain with his or her luggage or to arrange for its return. (*Id.*)–

> At least when the authorities do not make it absolutely clear how they plan to reunite the suspect and his

> possessions at some future time and place, seizure of the object is tantamount to seizure of the person. This is because that person must either remain on the scene or else seemingly surrender his effects permanently to the police. 3 W. LaFave, Search and Seizures 9.6, p.72 (Supp. 1982).

Id. fn.8.

In *United States v. Place*, 462 U.S. 696, 700, 103 S.Ct. 2637, 2641 (1983), this Court held that only when a law enforcement officers' observations provide him with a reasonable articulable suspicion that a traveller is carrying luggage that contains narcotics, the principles of *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868 (1968) and its progeny, permit the officer to briefly detain the luggage to investigate the circumstances that aroused his or her suspicion, provided that the investigatory detention is properly limited in scope. 462 U.S. at 706, 103 S.Ct. at 2644. The manner in which a seizure of personal property is conducted is a vital part of the inquiry. (*Id.* at 707-708, 103 S.Ct. at 2645). The seizure of the luggage must be conducted in a reasonable manner, or the fruits of such investigatory detention will not be admissible. (*Id.* at 707-10, 103 S.Ct. at 2644-46). Courts must therefore inquire whether the agents' conduct was such as to place the seizure within the general rule requiring probable cause for a seizure, or within the *Terry* exception to that rule. *Id. See also United States v. $191,910.00 in United States Currency*, 16 F.2d 1051, 1059 (9th Cir. 1994).

The evidence presented at the hearing on appellant's motion to suppress evidence clearly indicated that the purpose of the seizure in this case was to prevent the luggage from being placed on the scheduled flight, which was to depart for Chicago in ten minutes, so that the luggage could be immediately searched upon the obtaining of consent to search, or the conclusion of the officers that an abandonment had occurred. As in *Florida v. Royer*, 460 U.S. 491,

501, 103 S.Ct. 1319, 1326 (1983), the primary interest of the officers was not to have a conversation with Woo and Furukawa, but was directed to the contents of their luggage and in attempting to gain the consent to a search of their luggage. 460 U.S. at 504, 103 S.Ct. at 1328. As the Court stated in *Florida v. Royer*:

> We cannot agree with the State, if this is its position, that every nervous young man paying cash for a ticket to New York City under an assumed name and carrying two heavy American Tourister bags may be arrested and held to answer for a serious felony charge.

460 U.S. at 507, 103 S.Ct. at 1329.

The Officers in this case testified under oath that neither Woo or Furukawa appeared or acted unusual. One Officer testified that at approximately 11:20 p.m., he overheard Jon Woo tell the skycap that the bags were to be loaded on the 11:30 p.m. flight to Chicago and observed Woo display the airline tickets for both he and Petitioner. Based on these observations alone, the officers instructed the skycap to hold the two suitcases rather than send them on for boarding onto the aircraft, before the officers approached Woo and Furukawa to question them. These actions were undertaken without probable cause or reasonable suspicion, were deliberately undertaken to cause the luggage to miss the scheduled flight and were not reasonable. Accordingly, the ruling in this case is in direct conflict with relevant decisions of this Court affecting an important question of Federal law for which there is an overriding need for national uniformity.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that a Writ of Certiorari should issue to review the order and opinion of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

By: MICHAEL R. YAMAKI
Attorney for Petitioner
MANABU FURUKAWA

DATED: March 3, 1997

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MANABU JOHN FURUKAWA,

Defendant-Appellant.

No. 93-50605

D.C. No. CR-92-01120-KN

ORDER

Before: BROWNING, NORRIS, and REINHARDT, Circuit Judges

A majority of the panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for an en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MANABU JOHN FURUKAWA,
Defendant-Appellant.

NO. 93-50605

D.C. No. CR-92-01120-KN

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
David V. Kenyon, District Judge, Presiding

Argued and Submitted August 7, 1995
Pasadena, California

Before: BROWNING, NORRIS, and REINHARDT, Circuit Judges

I

The detectives identified themselves, asked to speak with the defendants, and told them they were free to leave. The encounter occurred in a public place. The detectives did not display weapons or physically restrain Furukawa. We conclude a reasonable person would have felt free to leave, the initial encounter was consensual, and no founded suspicion was required. *United States v. Brown*, 884 F.2d 1309, 1311

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

(9th Cir. 1989); *United-States v. Mendenhall*, 446 U.S. 544, 554 (1980) ("[A] person 'is seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave."). Based on the information obtained during this consensual encounter, including the fact that both airline tickets were issued under false names, one of the defendants possessed marijuana, and both denied checking any luggage although the detectives had seen them do so, the detectives had grounds for reasonable suspicion justifying the brief detention that preceded the search of the bags.

Persons "who voluntarily abandon property lack standing to complain of its search or seizure." *United States v. Nordling*, 804 F.2d 1466, 1469 (9th Cir. 1986). Furukawa relinquished possession of the bags to the airline and then denied ownership of them. Relinquishment of possession and denial of ownership is sufficient to establish abandonment for Fourth Amendment purposes, even when, as in this case, the officers earlier saw the defendant in possession of the property. *United States v. Veatch*, 674 F.2d 1217, 1221 (9th Cir. 1991).

Furukawa's denial of ownership was not rendered involuntary by the detention of the bags at curbside. An abandonment is rendered involuntary by police misconduct only if there is a nexus between the misconduct and the abandonment. See *United States v. Gilman*, 684 F.2d 616, 620 (9th Cir. 1982). Regardless of its legality, the curbside detention had no relation to the later abandonment—there is no indication the diversion of the bags led the detectives to approach Furukawa or that Furukawa knew the bags had been detained when he relinquished his privacy and possessory interest in them. *See United States v. Roman*, 849 F.2d 920, 923 (5th Cir. 1988).

Furukawa argues that even if abandonment of his privacy interest in the bags precluded challenge to the search of the bags after the abandonment, it did not affect his standing to challenge the initial diversion of the bags at curbside, which occurred before the abandonment, and to challenge the admissibility of any evidence derived therefrom. We need not reach the question.

The detectives' brief diversion of the bags prior to the abandonment did not result in a "meaningful interference" with Furukawa's possessory interest. *United States v. Jacobsen*, 466 U.S. 109, 113 (1984). The minute or so that elapsed between the detectives' request to the skycap to hold the bags and Furukawa's denial of ownership was too brief to have interfered with his travel. *Brown*, 884 F.2d at 1311 (no "seizure" where brief detention of luggage would not have interfered with defendant's travel or frustrated his expectations with respect to his luggage). Indeed, as Detective Oglesby testified, Furukawa arrived at the airport too late to permit the bags to be placed aboard his plane regardless of the detectives' request that they be held. *United States v. Johnson*, 990 F.2d 1129, 1132 (9th Cir. 1993).

II.

The district court did not abuse its discretion by admitting Woo's statements as adoptive admissions by Furukawa. Fed. R. Evid. 801(d)(2)(B). The court found sufficient foundational facts for the jury to conclude Woo's statements "were heard and understood and acceded to by Mr. Furukawa," *see United States v. Monks*, 774 F.2d 945, 950 (9th Cir. 1985); and the relevant factors support the court's determination that Woo's statements were reliable. *Id.* at 951-53. The taped conversation was the first conversation between Furukawa and Woo after their arrest. Furukawa did not deny knowledge of the cocaine or the purpose of the trip,

and there is little probability Woo had a faulty memory or was attempting to misrepresent Furukawa's role.

III.

The district court acted within its discretion in denying Furukawa's request for a reduction in base offense level as a "minor" or "minimal" participant under section §3B1.2 of the Guidelines. The court adopted the probation department's findings that Furukawa was present with Woo during the transportation of the drugs, had the suitcase keys in his possession, did not appear surprised during his conversation with Woo that Woo was transporting drugs, and was aware of many of the details of the transaction. These findings are not clearly erroneous. The district court found Furukawa's participation to be less than that of Woo but concluded "there was quite sufficient evidence to show that, contrary to what Mr. Furukawa says, . . . he knew exactly what he was doing and intended to make some money out of it, as he stated at an earlier time." The district court's denial of Furukawa's request for a downward adjustment must be sustained. *United States v. Davis* 36 F.3d 1424, 1436-37 (9th Cir. 1994).

AFFIRMED.

United States v. Furukawa, No. 93-50605

REINHARDT, Circuit Judge, Dissenting

I dissent.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Docket No. CR-92-1120-Kn
Social Security No.: Unknown

UNITED STATES OF AMERICA
vs.
MANABU JOHN FURUKAWA
Metropolitan Detention Center
535 N. Los Angeles Street
Los Angeles, CA 90012

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government, the defendant appeared in person on this date 8-9-93.

WITH COUNSEL Mark J. Werksman, Retained

PLEA: ☐ GUILTY, and the Court being satisfied that there is a factual basis for the plea, ☐ NOLO CONTENDERE, ☐ NOT GUILTY

FINDING: There being a finding/verdict of ☒ GUILTY, defendant has been convicted as charged of the offense(s) of: 21 USC 841(a)(1): Possession with intent to distribute cocaine (1 count).

JUDGMENT AND PROB./COMMITMENT ORDER:

The Court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown or appeared to the Court the Court adjudged the defendant guilty as charged and convicted and ordered held pursuant to the Sentencing Reform Act of 19??. It is the judgment of the Court that the defendant is hereby committed to the custody of the Bureau of Prisons to be imprisoned for a term of 151 months. Upon release from imprisonment, the defendant shall be placed on

supervised release for a term of five (5) years under the following terms and conditions: (1) The defendant shall comply with the rules and regulations of the U.S. Probation Office and General Order 318. (2) The defendant shall participate in outpatient substance abuse treatment and submit to drug and alcohol testing, as instructed by the Probation Officer. The defendant shall abstain from using illicit drugs and alcohol, and abusing prescription medications during the period of supervision.

Pursuant to Section 5E1.2(f) of the Guidelines, all fines are waived, including the costs of imprisonment and supervision, as it is found that the defendant doesn't have the ability to pay. IT IS FURTHER ORDERED that the defendant shall pay to the United States a special assessment of $50. Court advises defendant of his right to appeal.

Court recommends designation to a California facility.

/s/ DAVID V. KENYON

David V. Kenyon

Date Filed: August 13, 1993
By: L. Pulliam, Deputy Clerk